UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT S. BENNETT, NACHAEL FOSTER, ANDREW BAYLEY, and others similarly situated, Plaintiffs, v. STATE BAR OF TEXAS, Defendant.	Civil Action No. 4:21-cv-02829

REPLY IN SUPPORT OF DEFENDANT STATE BAR OF TEXAS' MOTION TO DISMISS

Plaintiffs' opposition to Defendant State Bar of Texas' motion to dismiss never meaningfully grapples with the fatal flaw in Plaintiffs' lawsuit: Controlling Fifth Circuit precedent holds that the State Bar of Texas—the only defendant properly before this Court, *see* Mot. to Dismiss 9 (Jan. 24, 2022), ECF No. 12—is entitled to sovereign immunity and does not qualify as a "person" subject to suit under 42 U.S.C. § 1983. *See Liedtke v. State Bar of Tex.*, 18 F.3d 315, 318 n.12 (5th Cir. 1994); *Bishop v. State Bar of Tex.*, 791 F.2d 435, 437-38 (5th Cir. 1986); *Krempp v. Dobbs*, 775 F.2d 1319, 1320-21 (5th Cir. 1985). Unable to overcome that binding precedent, which compels dismissal of this suit, Plaintiffs' opposition instead offers a series of *non sequiturs* and citations to inapposite case law.[1] None of Plaintiffs' arguments provides any basis for denying the Texas State Bar's motion to dismiss.

Contrary to Plaintiffs' suggestion, the Texas State Bar's sovereign immunity from suit in federal court does not depend on any "statutory" grant of immunity under state law. Opp'n ¶ 3.

[1] *See, e.g.*, Opp'n to Mot. to Dismiss ¶ 12 (Mar. 14, 2022), ECF No. 30 ("Opp'n") (citing *Forrester v. White*, 484 U.S. 219 (1988)—a case addressing judicial immunity, which is not at issue here).

Instead, the immunity of state governmental entities from suit in federal court "is a fundamental aspect of . . . sovereignty" reflected in the federal "Constitution's structure" and "history." *Alden v. Maine*, 527 U.S. 706, 713 (1999). In any event, to the extent it might be relevant to the Court's analysis, Texas case law has recognized that the Bar "is a governmental agency that is entitled to the protection afforded by sovereign immunity" under Texas state law. *State Bar of Tex. v. Wilson*, No. 03-18-00649-CV, 2019 WL 1272616, at *2 (Tex. App.—Austin Mar. 20, 2019, pet. denied); *see also* Mot. to Dismiss 13-14.

The cases Plaintiffs cite (Opp'n ¶¶ 4-6) involving claims against the *federal* government—*United States v. State Bank*, 96 U.S. 30 (1878); *Bull v. United States*, 295 U.S. 247 (1935); and *United States v. Dalm*, 494 U.S. 596 (1990)—provide no basis for disregarding the sovereign immunity of the *state* "administrative agency" that Plaintiffs have sued here, Tex. Gov't Code Ann. § 81.011(a). If anything, those cases *undermine* Plaintiffs' opposition. As *Dalm* explains, "settled principles of sovereign immunity" preclude a plaintiff from suing the federal government unless it has "consent[ed] to be sued" and the plaintiff's suit complies with "the terms of [that] consent." 494 U.S. at 608 (citation omitted). The Texas Bar has in no way consented to Plaintiffs' suit here.

Plaintiffs also cite the limited exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). *See* Opp'n ¶¶ 7-8. Under *Ex parte Young*, "suits seeking prospective, but not compensatory or other retrospective relief, may be brought against *state officials* in federal court challenging the constitutionality of official conduct enforcing state law." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (emphasis added); *see also Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020) (en banc) (listing criteria required for *Ex parte Young* to apply). The *Ex parte Young* doctrine, however,

"has no application" where, as here, a lawsuit is brought only against a state *agency*, rather than against state *officials*; such an action is "barred regardless of the relief sought." *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146; *accord Cory v. White*, 457 U.S. 85, 90-91 (1982). As the Bar has explained, *see* Mot. to Dismiss 9, it is the only defendant specifically named in Plaintiffs' complaint, *see* Compl. ¶ 13 (Aug. 30, 2021), ECF No. 2, and the docket in this case does not indicate that Plaintiffs have served a summons and copy of their complaint on any persons or entities other than the Bar (which agreed to waive service).[2] In *Krempp*, the Fifth Circuit dismissed claims for both damages and prospective relief based on sovereign immunity because the plaintiffs there only asserted claims against the Texas State Bar and another state entity and did not name any state agency officials as defendants. 775 F.2d at 1321. That holding squarely controls this case. *Ex parte Young* cannot save Plaintiffs' claims against the Texas State Bar.[3]

Plaintiffs further note (Opp'n ¶ 14) that *Keller v. State Bar of California*, 496 U.S. 1 (1990), held that the expressive activities of mandatory bars do not qualify as government speech for purposes of the "'government speech' doctrine." *Keller*, 496 U.S. at 10-13; *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (explaining that government speech is "not subject to scrutiny under the [First Amendment's] Free Speech Clause"). In doing so, *Keller* decided a question of First Amendment law. It did not address the separate question of whether mandatory bars may qualify as arms of the state entitled to sovereign immunity from suit in federal court. There was no reason for the Court to address that question in *Keller* because *Keller* arose

[2] *Zinermon v. Burch*, 494 U.S. 113 (1990) (cited at Opp'n ¶¶ 10-11), and *Hutto v. Finney*, 437 U.S. 678 (1978) (cited at Opp'n ¶ 9), involved suits against state officials and thus have no bearing here. *See Zinermon*, 494 U.S. at 114, 120-21; *Hutto*, 437 U.S. at 692-93, 699.

[3] Even if Plaintiffs had properly named and served state officials as defendants, sovereign immunity would still bar Plaintiffs' claims for retrospective monetary relief. *See Edelman v. Jordan*, 415 U.S. 651, 665-69 (1974); *see also infra* p. 4 (discussing final judgment in *McDonald v. Sorrels*).

from California's state courts, not from lower federal courts. *See Keller*, 496 U.S. at 5-7; *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 30-31 (1990) ("The Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts."). After the Supreme Court's 1990 decision in *Keller*, the Fifth Circuit's 1994 decision in *Liedtke* reaffirmed the circuit precedent holding that the State Bar of Texas is entitled to "eleventh amendment immunity." *Liedtke*, 18 F.3d at 318 n.12; *see also* Mot. to Dismiss 16 (citing post-*Keller* decisions from other circuits holding that mandatory bars were entitled to sovereign immunity). That precedent binds this Court and demands dismissal of Plaintiffs' suit.

The district court's final judgment in *McDonald v. Sorrels*, No. 1:19-cv-00219-LY (W.D. Tex.)—on which Plaintiffs' action here "is based," Notice of a Related Case ¶ 2 (Dec. 3, 2021), ECF No. 7—further demonstrates that the Texas State Bar's sovereign immunity remains intact after *Keller*. While citing *Keller*, the *McDonald* district court denied the plaintiffs' request for restitution of their Texas State Bar membership fees based on the Bar's "sovereign immunity." Mot. to Dismiss, Ex. 6, ¶¶ 2-3, 5. Similarly here, the Bar's sovereign immunity requires that this action be dismissed.

Contrary to Plaintiffs' contention, *see* Opp'n ¶¶ 15-23, dismissing Plaintiffs' action would be neither "[p]remature" nor "[u]nfair." The Bar and its counsel have already explained why Plaintiffs' "motion to show authority" (*id.* ¶ 15) is baseless. *See* Opp'n to Mot. to Show Authority (Feb. 10, 2022), ECF No. 17. While Plaintiffs make a conclusory request for an opportunity "to conduct discovery," Opp'n ¶ 16, they ignore that sovereign immunity entitles a state agency "not only to protection from liability, but also from suit, including the burden of discovery," *University of Tex. at Austin v. Vratil*, 96 F.3d 1337, 1340 (10th Cir. 1996). In any event, no amount of

discovery could change the fact that, under binding Fifth Circuit precedent, the Bar is entitled to sovereign immunity and does not qualify as a "person" subject to suit under § 1983.

The Court should dismiss this action.

Dated: March 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 18, 2022, I electronically filed the foregoing reply with the Clerk of the Court for the U.S. District Court for the Southern District of Texas by using the Court's CM/ECF system, which will send notification of such filing to the following:

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